

48A C.J.S. Judges § 320

Corpus Juris Secundum | August 2023 Update

Judges

Joseph Bassano, J.D.; Khara Singer-Mack, J.D.; Thomas Muskus, J.D.; Karl Oakes, J.D. and Jeffrey J. Shampo, J.D.

IX. Disqualification to Act

D. Objections to Judge and Proceedings Thereon

2. Mode and Sufficiency of Raising Objection

b. Affidavit of Bias or Prejudice

§ 320. Generally

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Judges](#)  51(3)

Generally, an affidavit of bias or prejudice must comply with the requirements of statute, and where so provided, the affidavit must set forth facts showing bias or prejudice of a serious and personal nature concerning the particular judge.

An affidavit claiming bias or prejudice as a basis for disqualification of a judge must comply with all requirements of statute.¹ While it has been held that strict observance is necessary,² it has also been held that substantial compliance with statutory requirements as to form and contents may suffice.³ Generally, it has been held that the affidavit must be strictly construed⁴ although it has also been stated that the law governing affidavits of prejudice must be given a liberal construction.⁵

In some jurisdictions, an affidavit alleging bias or prejudice is sufficient if made in the language of the statute,⁶ and the facts showing actual bias or prejudice need not be alleged.⁷ Under many statutes, however, it is necessary for the application or affidavit to set forth specific and substantial facts and reasons, in detail, showing bias or prejudice.⁸ Many statutes require the prejudice to be of a serious nature⁹ of the particular judge.¹⁰

Such alleged facts and reasons must, if true, fairly support the allegation that bias or prejudice or a bent of mind may prevent a fair decision on the merits¹¹ and must be such that a reasonable mind might fairly infer bias or prejudice on the part of the judge.¹² The test of a basis for disqualification is not the subjective belief of defendant or that of the court but the presentation of facts leading to a reasonable inference of the existence of bias or prejudice.¹³ The test of sufficiency of an affidavit of

disqualification for prejudice is whether or not the affidavit shows that the party making it has a well-grounded fear that the party will not receive a fair trial at the hands of the judge.¹⁴

The bias or prejudice alleged must be of a personal nature,¹⁵ calculated to impair the judge's impartiality and to sway his or her judgment,¹⁶ or be of such a character as would disqualify the judge by reason of public policy.¹⁷ In this respect, the facts pleaded in the affidavit will not suffice to show statutorily sufficient personal bias if they go to the background and associations of the judge rather than to the judge's appraisal of a party personally.¹⁸ Statements or actions of a party alleged to constitute an "attack" on the judge, without sufficient allegations as to the judge's response, are insufficient to disqualify such judge.¹⁹

The factual allegations of the affidavit must establish by more than a prima facie case but not beyond a reasonable doubt that the judge's mind is closed to justice.²⁰ In other words, the judge's personal bias or prejudice against the affiant must be of such nature and intensity that it would render the judge unable to give the affiant a fair trial.²¹ The affidavit must bear on its face some evidence of good faith,²² and an affidavit comprised of irrelevant matters is insufficient.²³ The time of discovery of the bias or prejudice need not be alleged.²⁴ An affidavit filed for the purpose of influencing a pending decision is improper.²⁵

Cumulative effect of allegations.

It has been held that although the individual allegations in an affidavit are insufficient, taken together, they may be legally and factually sufficient to show the appearance of possible personal bias or prejudice.²⁶ It has also been held, however, that while an affidavit of personal bias or prejudice purporting to be based on the cumulative effect of a series of statements may be legally sufficient, the whole can be no greater than its component parts so that each category of bias and prejudice stated and relied upon by the movant must be viewed for its independent legal sufficiency.²⁷

CUMULATIVE SUPPLEMENT

Cases:

Defendant's fear that he would not receive a fair hearing on his postconviction motion to mitigate sentence, as a result of statements made by the judge at the sentencing hearing when explaining the denial of defendant's request for a downward departure sentence, was not a legally sufficient ground for disqualification of judge. *West's F.S.A. RCrP Rule 3.800(c)*. *Davis v. State*, 174 So. 3d 646 (Fla. 1st DCA 2015).

[END OF SUPPLEMENT]

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Footnotes

1 D.C.—*York v. U.S.*, 785 A.2d 651 (D.C. 2001).

Ohio—*State v. Hunter*, 151 Ohio App. 3d 276, 2002-Ohio-7326, 783 N.E.2d 991 (9th Dist. Wayne County 2002).

Affidavit of prejudice could not be made retroactive

Wis.—*In re Hill's Estate*, 272 Wis. 197, 75 N.W.2d 582 (1956).

- 2 U.S.—*Marquette Cement Mfg. Co. v. Federal Trade Commission*, 147 F.2d 589 (C.C.A. 7th Cir. 1945).

Use of word "interest" rather than "bias or prejudice"
Wyo.—*Stroup v. City of Sheridan*, 392 P.2d 517 (Wyo. 1964).
- 3 Ariz.—*Murray v. Thomas*, 80 Ariz. 378, 298 P.2d 795 (1956).
- 4 U.S.—*U.S. v. Anderson*, 433 F.2d 856 (8th Cir. 1970).

Strict construction as to form, timeliness, and sufficiency
U.S.—*U.S. v. Womack*, 454 F.2d 1337, 24 A.L.R. Fed. 276 (5th Cir. 1972).

Reasonableness
U.S.—*Mavis v. Commercial Carriers, Inc.*, 408 F. Supp. 55 (C.D. Cal. 1975).
- 5 Minn.—*State v. Kraska*, 294 Minn. 540, 201 N.W.2d 742, 68 A.L.R.3d 505 (1972).
- 6 Ill.—*Corbetta Const. Co. of Illinois, Inc. v. Lake County Public Bldg. Commission*, 64 Ill. App. 3d 313, 21 Ill. Dec. 431, 381 N.E.2d 758 (2d Dist. 1978).

Nev.—*State ex rel. Kline v. Eighth Judicial Dist. Court*, 70 Nev. 172, 264 P.2d 396 (1953).

Wash.—*State v. Franulovich*, 89 Wash. 2d 521, 573 P.2d 1298 (1978).
- 7 Cal.—*Fairfield v. Superior Court for Los Angeles County*, 216 Cal. App. 2d 438, 31 Cal. Rptr. 3 (2d Dist. 1963).

Idaho—*State v. Bitz*, 93 Idaho 239, 460 P.2d 374 (1969).

Ind.—*Briscoe v. State*, 180 Ind. App. 450, 388 N.E.2d 638 (1979).
- 8 U.S.—*Klayman v. Judicial Watch, Inc.*, 744 F. Supp. 2d 264 (D.D.C. 2010).

Colo.—*Kane v. County Court Jefferson County*, 192 P.3d 443 (Colo. App. 2008).

Ga.—*Mayor & Aldermen of City of Savannah v. Batson-Cook Co.*, 291 Ga. 114, 728 S.E.2d 189 (2012).

Haw.—*Chen v. Hoeflinger*, 127 Haw. 346, 279 P.3d 11 (Ct. App. 2012), as corrected, (Mar. 12, 2012).

Kan.—*State v. Sawyer*, 297 Kan. 902, 305 P.3d 608 (2013).

Clear averments essential
Cal.—*Shakin v. Board of Medical Examiners*, 254 Cal. App. 2d 102, 62 Cal. Rptr. 274, 23 A.L.R.3d 1398 (2d Dist. 1967).

Showing of dislike by party insufficient
U.S.—*U.S. v. Goeltz*, 513 F.2d 193, 30 A.L.R. Fed. 488 (10th Cir. 1975) and *Bray v. U.S.*, 423 U.S. 830, 96 S. Ct. 51, 46 L. Ed. 2d 48 (1975)
- 9 U.S.—*U.S. v. Thomas*, 299 F. Supp. 494 (E.D. Mo. 1968).

Colo.—*Walker v. People*, 126 Colo. 135, 248 P.2d 287 (1952).

Utah—*Christensen v. Christensen*, 18 Utah 2d 315, 422 P.2d 534 (1967).
- 10 U.S.—*U.S. v. Devlin*, 284 F. Supp. 477 (D. Conn. 1968).

Ill.—*Chicago Park Dist. v. Lyons*, 39 Ill. 2d 584, 237 N.E.2d 519 (1968).

Ky.—*Miller v. Miller*, 459 S.W.2d 81 (Ky. 1970).

Blanket attempt at disqualification of district judges improper

N.M.—*Gray v. Sanchez*, 1974-NMSC-011, 86 N.M. 146, 520 P.2d 1091 (1974).

11 U.S.—*Parrish v. Board of Com'rs of Alabama State Bar*, 524 F.2d 98 (5th Cir. 1975); *Raitport v. Bradley*, 446 F. Supp. 129 (E.D. Pa. 1978).

Colo.—*Goebel v. Benton*, 830 P.2d 995 (Colo. 1992).

Ga.—*Gillis v. City of Waycross*, 247 Ga. App. 119, 543 S.E.2d 423 (2000).

Bias as to triable issues

The stated facts in the statement must make the judge's bias appear probable as to the issue or issues to be tried.

Cal.—*Shakin v. Board of Medical Examiners*, 254 Cal. App. 2d 102, 62 Cal. Rptr. 274, 23 A.L.R.3d 1398 (2d Dist. 1967).

12 U.S.—*Patterson v. Mobil Oil Corp.*, 335 F.3d 476 (5th Cir. 2003).

Colo.—*Carr v. Barnes*, 196 Colo. 70, 580 P.2d 803 (1978).

Fair support to charge

The affidavit must give fair support to the charge of a bent of mind that may prevent or impede the impartiality of the judgment.

U.S.—*U.S. v. Haldeman*, 559 F.2d 31, 1 Fed. R. Evid. Serv. 1203 (D.C. Cir. 1976) and *Mitchell v. U.S.*, 431 U.S. 933, 97 S. Ct. 2641, 53 L. Ed. 2d 250 (1977)

13 U.S.—*U.S. v. Corr*, 434 F. Supp. 408 (S.D. N.Y. 1977).

14 Fla.—*Peterson v. Asklepious*, 833 So. 2d 262 (Fla. 4th DCA 2002).

15 U.S.—*Patterson v. Mobil Oil Corp.*, 335 F.3d 476 (5th Cir. 2003).

Ariz.—*State v. Myers*, 117 Ariz. 79, 570 P.2d 1252 (1977).

Haw.—*State v. Pokini*, 55 Haw. 80, 515 P.2d 1250 (1973).

Possible bias against counsel irrelevant

U.S.—*U. S. v. Zagari*, 419 F. Supp. 494 (N.D. Cal. 1976).

16 U.S.—*Wilkes v. U.S.*, 80 F.2d 285 (C.C.A. 9th Cir. 1935).

Or.—*State ex rel. Bushman v. Vandenberg*, 203 Or. 326, 280 P.2d 344 (1955).

R.I.—*Kelley v. City Council of City of Cranston*, 61 R.I. 472, 1 A.2d 185 (1938).

17 Okla.—*Gee v. Security Bank & Trust Co., Enid*, 1939 OK 552, 186 Okla. 477, 98 P.2d 922 (1939).

Or.—*State ex rel. Bushman v. Vandenberg*, 203 Or. 326, 280 P.2d 344 (1955).

18 U.S.—*Com. of Pa. v. Local Union 542, Intern. Union of Operating Engineers*, 388 F. Supp. 155 (E.D. Pa. 1974).

Ohio—*Ohio Power Co. v. Brown*, 177 Ohio St. 45, 29 Ohio Op. 2d 72, 201 N.E.2d 879 (1964).

Alleged personal friendship with associate of defendant insufficient

U.S.—*Firnhaber v. Sensenbrenner*, 385 F. Supp. 406 (E.D. Wis. 1974).

Judge's employment background, including civil rights involvement

U.S.—*Paschall v. Mayone*, 454 F. Supp. 1289 (S.D. N.Y. 1978).

19 U.S.—*In re Union Leader Corp.*, 292 F.2d 381 (1st Cir. 1961); *U.S. v. Sinclair*, 424 F. Supp. 715 (D. Del. 1976).

20 U.S.—*Duplan Corp. v. Deering Milliken, Inc.*, 400 F. Supp. 497 (D.S.C. 1975).

21 U.S.—*U. S. v. Hanrahan*, 248 F. Supp. 471 (D. D.C. 1965).

22 U.S.—*U. S. v. Gilboy*, 162 F. Supp. 384 (M.D. Pa. 1958).

23 U.S.—*Rademacher v. City of Phoenix*, 442 F. Supp. 27 (D. Ariz. 1977).

Scandalous and impertinent affidavit

U.S.—*Barnes v. U.S.*, 241 F.2d 252 (9th Cir. 1956).

24 Mo.—*State v. Irvine*, 335 Mo. 261, 72 S.W.2d 96, 93 A.L.R. 232 (1934).

25 U.S.—*American Brake Shoe & Foundry Co. v. Interborough Rapid Transit Co.*, 6 F. Supp. 215 (S.D. N.Y. 1933).

26 U.S.—*U.S. v. Zerilli*, 328 F. Supp. 706 (C.D. Cal. 1971).

27 U.S.—*Duplan Corp. v. Deering Milliken, Inc.*, 400 F. Supp. 497 (D.S.C. 1975).

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